STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF MIDLAND, Plaintiff/Appellee-Cross-Appellant,	UNPUBLISHED June 11, 2013
v	No. 303611 Midland Circuit Court
BLUE CROSS BLUE SHIELD, Defendant/Appellant-Cross-Appellee.	LC No. 09-005709-CL

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant Blue Cross and Blue Shield of Michigan (BCBSM) appeals as of right the trial court's order entering judgment for plaintiff in the amount of $1,028,052. Of this amount, $933,052 represented the jury verdict, $55,000 represented case evaluation sanctions, and $40,000 represented prejudgment interest. We reverse and remand for entry of judgment in BCBSM's favor.

This case is one of several that government entities across the state have filed against BCBSM based on its practice of charging self-insured health-care customers an "access fee." On June 5, 2012, this Court released its decision in *Calhoun Co v Blue Cross and Blue Shield of Michigan*, 297 Mich App 1; 824 NW2d 202 (2012).[1] The factual summary set forth in *Calhoun Co* provides a brief background of defendant's access fee:

> [BCBSM] is governed by various Michigan statutes and is legally obligated to subsidize insurance policies for any Medicare-eligible person who is not a member of a "group." [BCBSM] internally refers to this subsidy as "other than group" (OTG). [BCBSM] is also required to maintain a contingency fund and ensure that each "line of business" is independently funded. [BCBSM's] self-insurance plan is one "line of business."

[1] Our Supreme Court subsequently denied Calhoun County's leave to appeal our decision, stating that it was "not persuaded that the question presented should be reviewed by this Court." *Calhoun Co v Blue Cross and Blue Shield of Mich*, 493 Mich 917, 917; 823 NW2d 603 (2012).

> In the late 1980s, [BCBSM] separately billed its customers for the cost of the OTG subsidy. Many self-insured customers were dissatisfied with paying the OTG charge; as a result, some customers hired [BCBSM's] competitors, while others simply refused to pay the OTG charge. [BCBSM] ultimately decided to merge mandatory business charges such as the OTG charge into the hospital claims for self-insured plans. Thus, the various business charges were no longer "visible" on billing statements, but were instead built into the bill submitted to the customer (after a reduction had already occurred because of [BCBSM's] network discounts). According to [BCBSM], these built-in charges were part of an access fee that was structured in part as the cost for access to [BCBSM's] hospital network discounts. [*Id*. at 4-5.]

On appeal, BCBSM argues in pertinent part that the trial court erred in denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Cedroni Assoc v Tomblinson, Harburn Assoc*, 492 Mich 40, 45; 821 NW2d 1 (2012). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A summary disposition motion brought under MCR 2.116(C)(10) should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

Calhoun Co controls the outcome of this appeal. In *Calhoun Co*, which interpreted a contract identical to the contract at issue here, this Court reached two distinct conclusions that are relevant to the instant case. First, this Court concluded that the parties' contract, which consisted of the Administrative Services Contract (ASC) and the yearly "Schedule A," unambiguously provided for the access fee. *Calhoun Co*, 297 Mich App at 18. Second, this Court concluded that while the amount of the access fee was not set forth in the contract itself, it "was reasonably ascertainable through [BCBSM's] standard operating procedures[.]" *Id*.

In reaching the first conclusion, this Court explained that according to the unnumbered paragraph in Article III of the ASC, Calhoun County was obligated to pay "additional fees beyond the administrative charge and stop-loss coverage." *Id*. at 15. This unnumbered paragraph also stated that the additional fees "would be reflected in the hospital claims cost contained in 'Amounts Billed.'" *Id*. at 16. Further, the ASC defined "Amounts Billed" as "the amount owed in accordance with [BCBSM's] 'standard operating procedures.'" *Id*. Consequently, this Court determined, the ASC allowed BCBSM to collect the access fee. *Id*.

In reaching the second conclusion, this Court explained that although the contract did not identify the amount of the access fee, the amount could be determined on the basis of BCBSM's "standard operating procedures," which were reflected in the "Development of Access Fee Factors." *Id*. at 19. This Court explained that given the common-law presumption against voiding contracts for indefiniteness, as well as the plain language of the contract itself, determining the access fee on the basis of the standard operating procedures was valid and

enforceable. *Id*. In addition, this Court observed that had Calhoun County wanted to review the calculation of the access fee, "it had the ability to do so through the contractual annual audit. . . ." *Id*.

Following the reasoning of this Court in *Calhoun Co*, which interpreted a contract identical to the contract at issue here, the trial court erred in denying BCBSM's motion for summary disposition pursuant to MCR 2.116(C)(10). The unambiguous language of the contract expressly authorized BCBSM to charge the access fee in accordance with its standard operating procedures. Further, the standard operating procedures were a valid, objective method for calculating the amount of the access fee. The ASC, each Schedule A, and the Development of Access Fee Factors were before the trial court when it decided the MCR 2.116(C)(10) motion. In *Calhoun Co*, this Court analyzed these three documents in concluding that BCBSM was contractually authorized to charge the access fee. We therefore conclude that the trial court erred as a matter of law in denying BCBSM's MCR 2.116(C)(10) motion.[2]

Plaintiff argues that the following unnumbered paragraph in Article III of the ASC was ambiguous and did not authorize defendant to charge the access fee:

> The Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant to 1980 PA 350 will be reflected in the hospital claims cost contained in Amounts Billed.

However, as this Court observed in *Calhoun Co*, a straightforward reading of the unnumbered paragraph establishes that the parties agreed to the payment of the access fee, and BCBSM was contractually authorized to add the access fee to the hospital claims. 297 Mich App at 17. Plaintiff highlights the testimony of its representatives and officials, each of whom testified that he or she had no knowledge that defendant was charging an access fee. Plaintiff argues that this testimony created a question of fact with respect to whether the parties agreed to the existence of an access fee. However, this argument misses the mark for two reasons. First, the trial court should have granted BCBSM's *pre-trial* motion for summary disposition under MCR 2.116(C)(10), so any trial testimony should be disregarded. *Pena*, 255 Mich App at 310. Second, when contractual language is unambiguous, it is improper to consider extrinsic evidence to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Here, this Court has held in *Calhoun Co* that the contract unambiguously authorized BCBSM to charge the access fee, so the testimony of plaintiff's witnesses should have no impact on the decision whether BCBSM was authorized to charge the access fee.

The trial court's decision below was rendered before our decision in *Calhoun Co* was released. Following that release, BCBSM moved for peremptory reversal, arguing that it was

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[2] Because plaintiff had no valid breach of contract claim, BCBSM could not have fraudulently concealed such a claim. Consequently, plaintiff's fraudulent concealment claim necessarily also failed as a matter of law.

impossible to reconcile the trial court's denial of its motion for summary disposition with our decision in *Calhoun Co*. In response, plaintiff argued that *Calhoun Co* is factually distinguishable from the instant case, so this Court is not obligated to follow *Calhoun Co*. Although we denied BCBSM's motion for peremptory reversal,[3] we disagree that we are not obligated to follow *Calhoun Co*.

The doctrine of *stare decisis* "establishes uniformity, certainty, and stability *in the law*," *Guardiola v Oakwood Hosp*, 200 Mich App 524, 529; 504 NW2d 701 (1993), quoting *Parker v Port Huron Hosp*, 361 Mich 1, 10; 105 NW2d 1 (1960) (emphasis in *Guardiola*), but *stare decisis* "does not control findings of fact." *Guardiola*, 200 Mich App at 529. In *Calhoun Co*, this Court decided as a matter of law that the plain, unambiguous language of the ASC and the Schedule A's authorized BCBSM to charge the access fee. *Calhoun Co*, 297 Mich App at 16.[4] Thus, this Court is bound to follow *Calhoun Co* in the instant appeal and conclude that BCBSM was contractually authorized to charge the access fee. See MCR 7.215(J).

Moreover, this Court in *Calhoun Co* decided as a matter of law that the amount of the access fee was reasonably ascertainable using BCBSM's standard operating procedures. *Calhoun Co*, 297 Mich App at 19. Thus, we again conclude that defendant's "standard operating procedures," set forth a contractually permissible, objective formula for calculating the access fee. See MCR 7.215(J).

Plaintiff asserts that in the instant case "the facts were undisputed that Defendant's 'standard operating procedures' do not include the method to determine the price of the Access Fee as embodied in the 'Development of Access Fee Factors[.]'" (emphasis in original). Plaintiff provides no explanation or supporting facts for this assertion. In our opinion, plaintiff's assertion misses the mark for two reasons. First, the Development of Access Fee Factors, which *Calhoun Co* found to "in conformity" with "BCBSM's standard operating procedures," 297 Mich App at 18-19, does set forth an objective formula. Second, the Development of Access Fee Factors is not *itself* the objective formula for determining the access fee. Rather, the Development of Access Fee Factors is a *reflection* of the objective formula used to determine the access fee. *Id.* at 19. Also, as BCBSM correctly observes, plaintiff has never disputed that the figures reflected in the Development of Access Fee Factors were consistently calculated pursuant to an objective, consistent formula.

We note that plaintiff filed a "conditional cross-appeal" in this matter, arguing that the trial court erred in allowing BCBSM to present certain expert witness testimony with respect to plaintiff's claim for conversion. Plaintiff thus asked the Court, in the event that we decided that a new trial was warranted, to rule that the trial court erred in denying its motion in limine to

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[3] *County of Midland v Blue Cross Blue Shield*, unpublished order of the Court of Appeals, entered August 21, 2012 (Docket No. 303611).

[4] "Under ordinary contract principles, if the language of a contract is clear and unambiguous, its construction is *a question of law* for the court." *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998) (emphasis added).

exclude the testimony of John Bauerlein. Because we find that the trial court should have granted BCBSM's motion for summary disposition prior to trial, the condition that would have given rise to plaintiff's cross-appeal has not occurred. We therefore decline to address plaintiff's cross-appeal, and dismiss it as moot. See *City of Warren v City of Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004).

Reversed and remanded for entry of judgment in BCBSM's favor. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra